IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO.2014 OF 1995

M/s.Sudhir Diamonds,
a partnership firm registered
under the Indian Partnership Act,1932
having its office at 1102, Prasad
Chambers, Near Roxy Cinema,
Bombay-400 004 .. Petitioner

v/s.

1. Union of India

2. Additional Chief Controller of Imports
& Exports, having his office at Udhyog
Bhavan, New Delhi.

3. Jt.D.G.F.T. Having his office at
New C.G.O.Bldg., Bombay-400 020.

4. Under Secretary to the
Government of India, having his
office at Udhyog Bhavan, New Delhi. .. Respondents

Mr.Vikram Nankani with Mr.N.M.Shah for the petitioner.

Mr.A.J.Rana, Senior Counsel with Mr.P.S.Jetley and Ms.S.V.Bharucha for the respondents.

CORAM : R.M. LODHA &
J.P.DEVADHAR, JJ.

DATED : 9TH MARCH, 2006.

ORAL JUDGMENT (Per R.M.Lodha, J.)

The petitioner by means of this writ petition filed under

Article 226 of the Constitution of India seeks to impugn the order dated 19th August, 1991 (Exhibit `M'), the order dated 25th September, 1991 (Exhibit `N'), the order dated 16th March, 1992 (Exhibit `O') and the order dated 12th May, 1994 (Exhibit `Q').

2. The order dated 19th August, 1991 (Exhibit `M') is the order passed by the Additional Chief Controller of Imports and Exports imposing fiscal penalty of Rs.1,00,00,000/- upon the petitioner and its partners exclusive of the value of the licenses that they surrendered.

3. The order dated 25th September, 1991 (Exhibit `N') is debarment order under clause 8(1) of the Imports (Control) Order, 1955 passed by the Deputy Chief Controller of Imports and exports debarring the petitioner firm and its partners from importing any goods or getting any licenses/CCPs/Exim Scrips and getting allotments of imported goods from canalising agencies such as STC/MMTC.

4. The order dated 16.3.1992 (Exhibit `O') is the order passed by the appellate authority against the order of debarment dated 25.9.1991.

5. The order dated 12th May, 1994 (Exhibit `Q') is the order

passed by the appellate authority in the appeal from an order imposing the fiscal penalty of Rs.1,00,00,000/- for not fulfilling export obligation.

6. In so far as debarment order dated 25th September, 1991 and the order dated 16th March, 1992 passed by the appellate authority affirming the debarment order are concerned, the learned counsel for the petitioner submitted that in view of long passage of time, the petitioner is not desirous of pressing the grievance concerning the said two orders.

7. The challenge in the writ petition, thus, remains in respect of the order dated 19th August, 1991 passed by the Additional Chief Controller of Imports and Exports imposing the fiscal penalty of Rs.1,00,00,000/- and the appellate order dated 12th May, 1994 rejecting the appeal challenging the order dated 19th August, 1991.

8. The petitioner received an imprest licence No.P/L/3066303 dated 29.3.1985 for Rs.1,30,00,000/- for import of diamonds uncut and unpolished subject to an obligation to export cut and polished diamonds for an FOB value of Rs.2,00,00,000/-. The export obligation was to be fulfilled within a period of six months from the date of clearance of first

consignment against the imprest licence. That the import of the diamonds by utilisation of the said imprest licence was effected during the period 5th April, 1985 to 20th December, 1985 is apparent from the averments made in the writ petition. It is not in dispute that the first consignment against the imprest licence was cleared vide Bill of Entry No.A.3268/2(24) on 5.4.1985 and that the export obligation period was fixed from 2nd April, 1985 to 1st October, 1985.

9. Since the petitioner failed to discharge the export obligation, a notice dated 7.11.1990 under section 4-L for action under section 4-I of the Imports and Exports (Control) Act, 1947 was issued to the petitioner requiring the petitioner to show cause within 30 days from the date of receipt of the said notice as to why action should not be taken against it and its partners and penalty be not imposed for the misutilisation of goods valued at Rs.1,30,00,000/- against the aforesaid import imprest licence and for their contravention of the conditions of the said licence.

10. In response to the said notice dated 7th November, 1990, the petitioner sent reply on 13th November, 1990. In the reply, the case was set up by the petitioner that the goods happened to be imported/cleared only late June and July, 1985 and that the

delay was caused by the importers due to non-availability of the required goods with the result that within a very short span of about 10 to 12 days, it was impossible to have the goods manufactured and shipped to the clients vide their orders. That resulted in the foreign clients telephonically cancelling their orders. They were left with no alternative but to search desperately for alternative avenues for foreign clients, so that import obligation fulfilled but nothing could be done. The firm also happened to be reconstituted and there were considerable financial problems in the business activities with the result the export obligation remained to be fulfilled.

11. Vide their letter dated 8th April, 1991, the petitioner stated that the valid REP licenses towards fulfillment of export obligation as set out in the letter were being surrendered. The petitioner prayed that since the valid REP licenses equivalent to the value of the imprest licence utilised have been surrendered, the obligation may be treated as discharged and the show-cause notice be withdrawn.

12. The Additional Chief Controller of Imports and Exports, after hearing the petitioner, found that throughout the show-cause notice, the petitioner did not indicate as to what happened to the imported raw materials valued at Rs.1,30,00,000/-. The

authority was of the view that the petitioner sold the entire imported raw materials and, to cover misutilisation, the REP licences were surrendered. In the opinion of the authority, in the absence of imported goods being accounted for at any stage during the course of show cause notice proceedings, there was no option but to conclude that the petitioner was guilty of willful default with ulterior motives of misutilisation of imported goods. Consequently, the authority imposed fiscal penalty of Rs.1,00,00,000/- on the petitioner and its partners exclusive of the value of licenses that they surrendered vide his order dated 19th August, 1991.

13. The appeal preferred by the petitioner against the said order was dismissed on 12th May, 1994.

14. We heard Mr.Vikram Nankani, the learned counsel for the petitioner and Mr.A.J.Rana, the learned senior counsel for the respondents.

15. The thrust of the argument of the learned counsel for the petitioner is that the REP licenses having been surrendered by the petitioner pursuant to the order dated 24th September, 1990, the liability of the petitioner stood discharged in view of the Duty Exemption Scheme para 350 (Hand Book of Import Export

Procedure 1985-88). The learned counsel would submit that the petitioner was not specifically noticed that penalty was sought to be levied on account of any lapse or any slackness on his part. He would also contend that the order imposing fiscal penalty of Rs.1,00,00,000/- is premature action in asmuch as petitioner even does not know what happened to the surrender of REP licences pursuant to the order dated 24th September, 1990. According to the learned counsel, imposition of fiscal penalty in the sum of Rs.1,00,00,000/- despite surrender of valid REP licenses for non-fulfillment of export obligation is illegal and arbitrary.

16. On the other hand, Mr.A.J.Rana, the learned senior counsel for the respondents submitted that the fiscal penalty of Rs.1,00,00,000/- was levied after giving show-cause notice to the petitioner and upon taking into consideration all relevant aspects highlighted by the petitioner in response to the notice. The learned senior counsel submitted that the Additional Chief Controller of Imports and Exports has given solid reasons for imposition of penalty of Rs.1,00,00,000/- and the said order has been maintained by the appellate authority and, therefore, there is no justification for interference in the impugned order.

17. We bestowed our thoughtful consideration to the

submissions of the learned senior counsel and the counsel for the parties.

18. The petitioner does not dispute the non-fulfillment of the export obligation within a period of six months from the date of the clearance of the first consignment against the imprest licence dated 29.3.1985. It is also not in dispute that by the imprest licence dated 29.3.1985, the petitioner got licence to import diamonds uncut and unpolished for Rs.1,30,00,000/- subject to an obligation to export cut and polished diamonds for the affirming value of Rs.2,00,00,000/-. That the export period of obligation was fixed from the 2nd April, 1985 to 1st October, 1985 is also not in dispute. Admittedly, during this period not even partial export obligation was discharged. Even after the expiry of the export obligation period, the petitioner imported the uncut and unpolished diamonds and cleared the consignment against the said imprest licence on 20th December, 1985 but took no steps in discharging export obligation. The petitioner claims to have effected export of part of the imported diamonds in discharge of the export obligation to the extent of CIF value of Rs.14,36,462/- having FOB value of Rs.17,14,417.40 but no proof to that effect was submitted by the petitioner before the concerned authority. As the petitioner failed to fulfill its export obligation, on 15th March, 1987, show-cause notice was issued

by the Joint Controller of Imports and Exports, Bombay as to why the petitioner be not declared defaulter for non-fulfillment of the export obligation. The petitioner does not dispute that on 15th March, 1989, the Joint Controller of Imports and Exports, Bombay issued forfeiture order. It was only thereafter that on 12th April, 1989, the petitioner made an application for extension of the period for discharge of the export obligation upto 30th September, 1989. The said application came to be rejected on 6th June, 1989. The notice putting the petitioner company in abeyance for a period of six months was also issued on 5th October, 1989 in exercise of the power under clause 8(1) of the Import Control Order, 1985. It was thereafter that on 7th August, 1990, the show-cause notice was issued to the petitioner and its partners for action against them for contravention of Import and Export Control Act, 1947 and the terms of the licenses. The said notice came to be issued to the petitioner under section 4-L for action under section 4-I of the Act of 1947. The said show-cause notice dated 7.11.1990 is clear, categorical and elaborate setting out the export obligation under the imprest licence, the non-fulfillment thereof by the petitioner and the order of defaulter having already issued against the petitioner on 15.3.1989 that the petitioner failed to fulfill the export obligation imposed on the imprest licence. The show-cause notice also records reasons to believe that the imported

goods valued at Rs.1,30,00,000/- (CIF) were utilised by the petitioner otherwise than in accordance with the conditions of the imprest licence and that, prima facie, it appears that the imported goods have been misutilised by the petitioner and this violation attracts the provisions of section 4-I(I)(a) of the Import and Export Control Act, 1947 as amended.

19. That the petitioner was not kept in dark and was fully aware of the action that was proposed to be taken against them is clear from the reply filed by them on 13th November, 1990. Whatever explanation the petitioner had it put forth in its reply. In this backdrop, the contention of the learned counsel for the petitioner that the petitioner was not specifically put to notice for levy of penalty on the ground of its failure to fulfill the export obligation on account of lapse or slackness on its part is wholly misconceived. The petitioner was noticed. The petitioner knew what action was proposed against it because of the failure on its part in the fulfillment of export obligation.

20. The petitioner put forth the following explanation in its reply dated 13.11.1990:-

> Sir, we wish to state that the above Imprest Licence had happened to be obtained on the basis of export orders on hand of our Foreign Clients. In the said export orders the shipment period mentioned was that the goods ought to be shipped by the end of

July, 1985.

Sir, in this connection we would like to state that the goods happened to be Imported/Cleared only late June and July 1985 and the delay being caused by the Importers due to non-availability of the required goods and with the result that within a very short span of about 10 to 12 days it was virtually impossible to have the goods manufactured and shipped to the clients vide their Orders. The shipment period deadline coming to an end, the foreign clients telephonically cancelled/revoked their Orders and thus considerable and grave/tremendous responsibilities be fell on the Firm. We were left with no alternative but to search desperately for alternative avenues for foreign clients so that exports could be effected and export obligation fulfilled. Further, just before the period of grant of licence, the Firm also happened to be re-constituted and thus there were considerable financial problems also on the business activities with the result the export obligation remained to be fulfilled.

Sir, we have to state that we vide our letter dated 20.3.1989 Jt.Chief Controller of Imports & Exports, Bombay counter Receipt No.34189 dated 4.4.1989 submitted an export evidence for an REP licence entitlement value of Rs.14,36,462/- and f.o.b. Value of Rs.17,14,417.70 against fulfillment of export obligation towards the above said Imprest licence and also we have stated in our letter dated 5.9.1990 that for the balance export obligation, we are prepared to surrender REP licences to the extent of licence utilised value. Sir, we also wish to state that we have been put in “Caution list” by the Reserve Bank of India and have been prohibited from exporting/effecting exports.”

21. The aforesaid explanation has been considered by the Additional Controller of Imports and Exports in his order dated 19.8.1991 thus-

"9. The notice firm's proposal to surrender valid REP licences for Rs.1,21,23,830/- in lieu of export obligation could be considered had fully accounted for the imported rough diamonds uncut and unset. Throughout the show cause notice proceedings, they did not indicate as to what happened to the imported raw materials valued at Rs.1,30,00,000/-. Therefore, proposal to surrendered REP licence in lieu of export obligation, clearly shows that they had sold away the entire imported imported raw materials and to cover misutilisation they have submitted REP licences. Moreover while the stipulated export obligation is for Rs.2,00,00,000/- and they submitted REP licences for Rs.1,21,23,830/- against imports of Rs.1,30,00,000/-. As such in the absence of imported goods being accounted for at any stage during the course of show cause notice proceedings, I am left with no option except to conclude that this is a case of willful default with ulterior motives of mis-utilisation of imported goods. The noticee may have spent about Rs.4 to 5 lakhs to procure the REP licences valued at Rs.1,21,23,830/- which they have submitted to me in view of export obligation. Considering the facts that they had imported rough diamonds valued at Rs.1,30,00,000/- and they were under an obligation to export cut and polished diamonds to the extent of Rs.2,00,00,000/- the surrender of REP licences is no substitution for completion of export obligation. At most I accept the surrendered REP licences valued at Rs.1,21,23,830/- as a part of fiscal penalty in the light of their market value Rs.4 to 5 lakhs). Since the firm did not complete export obligation and also amply failed to honour export obligation commitment, I am inclined to believe that they had mis-utilised the goods valued at Rs.1,30,00,000/- imported against Imprest Licence No.P/L/3066303 dated 29.03.1985 without discharging export obligation. I, therefore, hold them guilty of contravening Section 4-I (1) and (a) of the Imports and Exports (Control) Act, 1947, as amended. In exercise of the powers vested in me under Section 4-K of the said Act, I hereby impose fiscal penalty of Rs.1,00,00,000/- (Rupees One Crore only) on M/s.Sudhir Diamonds, 410, Prasad Chambers, Opera House, Bombay and its partners Shri Sudhir K. Shah, Shri Kantilal Virchand Shah and Shri Ramesh Chandra Babaldas Mehta. The penalty of Rs.1 crore

> imposed on the firm and its partners is exclusive of the value of the licences they have surrendered."

22. A close look at the reasons set out by the concerned authority while imposing fiscal penalty of Rs.1,00,00,000/- in the impugned order leaves no manner of doubt that the said authority was satisfied that non-fulfillment of the export obligation by the petitioner was on account of the lapse and/or slackness. It was not necessary on the part of the concerned authority to record that in so many words and use the expression used in clause (3) of para 350-A(1) of Duty Exemption Scheme as it is.

23. The contention of the learned counsel for the petitioner that the petitioner surrendered the valid REP licenses in lieu of discharge of export obligation as provided in para 350-A(1) of the Duty Exemption Scheme and, therefore, the obligation on the part of the petitioner stood discharged and no penalty could have been imposed is noted to be rejected. The authority has given reasons, and in our opinion valid, which justifies the order of penalty despite surrender of valid REP licences. We are also unable to appreciate the submission of the learned counsel for the petitioner that imposition of fiscal penalty is premature action as the petitioner does not know as to whether the valid REP licenses surrendered by the petitioner hads been accepted

or not. Though there is some discrepancy in respect of the number of licence and the date thereof in the order dated 24th September, 1990, from the said order, it appears that the petitioner was advised to surrender the valid REP licenses to the extent of shortfall in the export obligation and that later on in compliance thereof, the REP licenses were surrendered. That surely would not absolve the fiscal penal liability. The concerned authority noticed that the petitioner failed to indicate as to what happened to the imported raw materials valued at Rs.1,30,00,000/-. For want of any explanation and the account for the imported raw materials valued at Rs.1,30,00,000/-, the inference drawn by the authority that the petitioner sold away the entire imported raw materials without accounting for the same is not without any basis. The concerned authority cannot be said to have erred in observing that in the absence of the imported goods being accounted for by the petitioner, the willful default with ulterior motive on the part of the petitioner of misutilisation of imported goods has to be inferred. In a case like this where the petitioner imported raw material valued at Rs.1,30,00,000/-; that the first consignment was cleared on 5.4.1985; that the export obligation was to be discharged within six months therefrom; not even partial export obligation was discharged during the period of six months; that the imported material valued at Rs.1,30,00,000/- was not accounted for and

that for the first time the application for extension of the period of export obligation was made on 12th April, 1989 (more than 3.1/2 years) after the period of export fulfillment of obligation had lapsed clearly shows that the failure to fulfill the export obligation under the imprest licence was due to deliberate lapse or in any case, lapse or slackness on the part of the petitioner and the facts clearly justify the imposition of fiscal penalty to the tune of Rs.1,00,00,000/- irrespective of surrender of valid REP licences.

24. The petitioner is guilty of wholesale contravention of the Import and Export Control Act, 1947, the Import-Export Policy, 1985-88 and the licence granted to the petitioner.

25. We, therefore, find no justification to interfere in the impugned orders.

26. As the petitioner has not paid the penalty for more than 10 years despite that there was no stay order by this court and the respondents have been deprived of its revenue, we hold that the respondents shall be entitled to recover the penalty of Rs.1,00,00,000/- from the petitioner with the simple interest of Rs.6% from 12th May, 1995.

27. Writ petition is, accordingly, dismissed with costs which

we quantify at Rs.10,000/-.

(R.M.LODHA, J.)

(J.P.DEVADHAR, J.)